No. 93-5256

In the Supreme Court of the United States

OCTOBER TERM, 1993

FREDEL WILLIAMSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOHN F. MANNING
Assistant to the Solicitor General

DAVID S. KRIS
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

45pp

QUESTIONS PRESENTED

1. Whether a post-arrest confession by an accomplice implicating a defendant, offered as a statement against penal interest of an unavailable declarant under Fed. R. Evid. 804(b)(3), bears adequate indicia of reliability to render it admissible under Rule 804(b)(3) and the Sixth Amendment Confrontation Clause.

2. Whether a post-arrest confession by an accomplice implicating a defendant, offered as a statement against penal interest of an unavailable declarant under Rule 804(b)(3), constitutes a firmly rooted hearsay exception rendering it presumptively reliable and not subject to further analysis under the Sixth Amendment Confrontation Clause.

3. Whether a statement can be admitted under Rule 804(b)(3) only if it is corroborated by circumstances surrounding the making of the statement that indicate its trustworthiness.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued: Page

Cases – Continued: Page

Cases – Continued: Page

Constitution, statutes and rules:

Statutes and rules – Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-5256

FREDEL WILLIAMSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The judgment order of the court of appeals affirming petitioner's conviction (J.A. 78) is unpublished, but the judgment is noted at 981 F.2d 1262 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1992. J.A. 78. A petition for rehearing was denied on March 24, 1993. J.A. 79. On June 16, 1993, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including July 15, 1993. The petition was filed on that date and was granted on January 10, 1994. J.A. 80. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.

Rule 804(b) of the Federal Rules of Evidence provides in pertinent part as follows:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * * * *
>
> **(3) Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted of conspiring to possess, and of possessing, cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846, and engaging in interstate travel to promote the distribution of cocaine, in violation of 18 U.S.C. 1952. The district court sentenced petitioner to 327 months in prison, to be followed by five years of supervised release. J.A. 71-77. The court of appeals affirmed. J.A. 78.

1. On March 26, 1989, a deputy sheriff in Dooly County, Georgia, stopped a rental car driven by Reginald Harris because the car was weaving on an interstate highway. Harris consented to a search of the car. The search revealed 19 kilograms of cocaine in luggage in the trunk. The luggage bore the initials of petitioner's sister. Petitioner was listed as an additional driver on the car rental agreement. An envelope addressed to petitioner and a receipt bearing petitioner's girlfriend's address were found inside the glove compartment. Tr. 79-97, 100-103, 107-108, 256.

Harris was arrested, and Special Agent Donald Walton of the Drug Enforcement Administration twice interviewed Harris. Agent Walton first spoke with Harris by telephone shortly after his arrest. Walton testified that during that conversation, Harris said he had obtained 19 kilograms of cocaine from an unidentified Cuban in Fort Lauderdale, Florida; that the cocaine belonged to petitioner; and that it was to be delivered that night to a dumpster located behind a service station on Redan Road in Atlanta. J.A. 37; see also J.A. 27-30, 54-55.

Several hours later, Agent Walton spoke to Harris in person. During that interview, Harris said he had rented the car a few days earlier and had driven it to Fort Lauderdale to meet petitioner. Harris said he had obtained the cocaine from a Cuban who was an acquaintance of petitioner. Harris told Walton that the Cuban had placed the cocaine in the rental car with a note instructing him on how to deliver the drugs. Harris repeated that he had been instructed to take the drugs to a dumpster in the parking lot of a service station on Redan Road in Atlanta, and to deposit the cocaine in the dumpster, to return to his car, and to leave without waiting for anyone to pick up the drugs. J.A. 38-39.

Agent Walton then took steps to arrange a controlled delivery of the cocaine. As Walton was preparing to leave the interview room to arrange the delivery, however, Harris admitted that he had lied about the Cuban, the note, and the delivery to the dumpster. Harris "got out of his chair * * * and * * * took a half step toward [Walton] * * * and * * * said, 'I can't let you do that,' threw his hands up and said 'that's not true, I can't let you go up there for no reason.' " J.A. 40. Harris then said that at the time he was stopped on the interstate highway, he was transporting the cocaine to Atlanta for petitioner, and that petitioner was traveling in front of him in another rental car. Harris added that after Harris's car was stopped, petitioner turned around and drove past the location of the stop, where he was able to see Harris's car with its trunk open. *Ibid.* Because petitioner had apparently seen the police searching Harris's car, Harris explained that it would be impossible to make a controlled delivery. J.A. 41.

Harris told Agent Walton that he had previously lied about the source of the drugs because he was afraid of petitioner. J.A. 61, 68; see also J.A. 30-31. Although Harris freely implicated himself, he was concerned that his story would be recorded, and he refused to sign a written version of his statement. J.A. 24-25.

Agent Walton further testified that he had promised to report any cooperation by Harris to the Assistant United States Attorney. Walton said that Harris was not promised any reward or other benefit for cooperating. J.A. 25-26.

2. When called to testify at petitioner's trial, Harris invoked his Fifth Amendment privilege against compelled self-incrimination. Although he was given use immunity, Harris refused to testify despite a court order directing him to do so. J.A. 9-15. The district court then ruled that

Agent Walton could relate what Harris had said to him. The court admitted Harris's statements under Fed. R. Evid. 804(b)(3) as statements against penal interest. J.A. 51-52.[1] The court explained:

> The ruling of the Court is that the statements made by defendant Harris to Agent Walton are admissible under [Rule 804(b)(3)], which deals with statements against interest.
>
> First, defendant Harris' statements clearly implicated himself, and therefore, are against his penal interest.
>
> Second, defendant Harris, the declarant, is unavailable.
>
> And third, as I found yesterday, there are sufficient corroborating circumstances in this case to ensure the trustworthiness of his testimony. Therefore, under [*United States* v. *Harrell,* 788 F.2d 1524 (11th Cir. 1986)], these statements by defendant Harris implicating [petitioner] are admissible.

Ibid. See also J.A. 31 ("this Court finds that the corroborating circumstances clearly indicate the trustworthiness of the statement").

3. On appeal, petitioner argued that Harris's statements to Agent Walton were not admissible under Fed. R. Evid. 804(b)(3) or the Confrontation Clause of the Sixth Amendment. Pet. C.A. Br. 12-24. The court of appeals affirmed without opinion. J.A. 78.

---

[1] Initially, the court appears to have ruled that the statements were admissible as statements of a co-conspirator made in furtherance of a conspiracy under Fed. R. Evid. 801(d)(2)(E). See J.A. 34-36, 47. At the close of Agent Walton's direct testimony, however, the court stated that it was admitting the evidence under Fed. R. Evid. 804(b)(3). J.A. 51-52.

SUMMARY OF ARGUMENT

I. This case raises questions about the interaction of the Confrontation Clause and the federal hearsay exception for statements against interest, Fed. R. Evid. 804(b)(3). Rule 804(b)(3) authorizes the admission of an out-of-court statement by an unavailable declarant if the district court finds that the statement is so far contrary to the declarant's interest that "a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Where the declarant's penal interest is at issue, the Rule requires the district court to make a determination in each case that the statement in question actually exposed the declarant to criminal liability and that it did so in a manner and to a degree that provides a substantial guarantee against falsehood.

A. Because the Rule requires a case-specific determination that the statement in question is truly against the declarant's penal interest to the extent necessary to provide assurance of reliability, the Rule does not make broad classes of statements per se admissible or per se inadmissible. It is therefore contrary to the principle underlying the Rule to suggest that post-arrest confessions by an accomplice can never be admissible. Even if some accomplice confessions are not sufficiently against the accomplice's penal interest to the degree necessary to guarantee reliability, other such confessions may satisfy the specific showing required by the Rule and thus be admissible. The question is one that cannot be answered categorically, but must be addressed based on the circumstances of each case.

B. The district court was correct in finding Harris's statements to be so contrary to his penal interest that it is unlikely that a reasonable person would have made the

statements if he had not believed them to be true. The statements clearly exposed Harris to prosecution for drug possession and conspiracy; they provided the government with critical evidence that Harris knew drugs were in the trunk of the car—something that would not have been established by the mere discovery of the drugs, particularly since the drugs were found in a suitcase bearing someone else's initials. In addition, Harris's statement did not minimize his own involvement in the offense while shifting blame for the offense to petitioner, and Harris was not offered any kind of plea or cooperation agreement that would have reduced his criminal exposure in exchange for statements incriminating petitioner.

Moreover, Harris's revision of his story, when Agent Walton was about to test it, provided a firm basis for believing that the revised version of the story was true. In his initial account, Harris sought to conceal petitioner's role in accompanying the cocaine during its transportation and as the ultimate recipient of the cocaine. His revised account, in which he revealed the full extent of petitioner's involvement in the scheme, was thus particularly trustworthy because it was made at a time when Harris recognized that his story would be subject to verification and his troubles would be worse if he were found to have persisted in lying to the officers.

C. Rule 804(b)(3) does not limit admission to those specific portions of a confession that directly inculpate the declarant. As long as a statement is against the declarant's penal interest, all parts of the statement that are integrally related to the inculpatory portion are admissible. Harris's references to petitioner were an integral part of his confession, and thus were properly admitted under the Rule.

II. The admission of Harris's statements did not violate the Confrontation Clause. If particular out-of-court statements are admitted under a firmly rooted hearsay exception, it is not necessary to conduct a separate inquiry into whether the statements bear sufficient indicia of reliability to satisfy the Confrontation Clause. The hearsay exception for statements against penal interest, as articulated in Rule 804(b)(3), is a firmly rooted exception, and for that reason evidence that is admissible under the Rule does not have to pass a second, and separate, Confrontation Clause test.

There has long been a hearsay exception for statements against interest by declarants who are unavailable to testify at trial. That exception is undoubtedly a "firmly rooted" exception, at least as to statements against pecuniary or proprietary interest. Petitioner argues that the "penal interest" branch of that exception is not firmly rooted, because for a period of time beginning in the mid-19th century, that branch of the exception was not recognized in federal law and in many States. The recent trend, however, has been in favor of recognizing statements against penal interest as falling within the hearsay exception for statements against interest, and the "penal interest" branch of the exception is now recognized in the Federal Rules of Evidence and in a substantial majority of the States. The "penal interest" branch of the statements-against-interest exception to the hearsay rule is therefore properly regarded as among the firmly rooted hearsay exceptions for which the Confrontation Clause imposes no "second tier" test for reliability. Accordingly, once Harris's statements were found to be admissible under Rule 804(b)(3), the Confrontation Clause imposed no barrier to their admission.

III. Neither Rule 804(b)(3) nor the Confrontation Clause requires the government to establish corroborating circumstances that would indicate the trustworthiness of the statement. The Rule requires a showing of corroborating circumstances only in the case of statements against penal interest that are offered to *exculpate* a criminal defendant; it therefore cannot be read to impose such a requirement in *all* cases. With respect to the Confrontation Clause, the determination that the hearsay exception for statements against penal interest is "firmly rooted" obviates the need for a special showing of corroborating circumstances with respect to each statement offered for admission. In any event, however, because Rule 804(b)(3) requires the court to find that a reasonable person would not have made the statement unless believing it to be true, the reliability concerns that are raised when hearsay is admitted over a Confrontation Clause objection are satisfied by the requirements of the Rule itself. Thus, the very requirements of the Rule serve the same function of guaranteeing reliability that is served by the requirement of corroborating circumstances that the Confrontation Clause imposes on statements not falling within traditional exceptions to the hearsay rule.

ARGUMENT

I. HARRIS'S OUT-OF-COURT STATEMENTS WERE ADMISSIBLE AS STATEMENTS AGAINST HIS PENAL INTEREST

A. Post-Arrest Statements By An Accomplice Are Not Per Se Inadmissible Under Rule 804(b)(3)

Petitioner contends (Br. 30-33) that this Court should adopt a per se rule that no post-arrest confession by an

accomplice implicating a defendant should be admitted as a statement against penal interest under Fed. R. Evid. 804(b)(3). There is nothing in the text or history of Rule 804(b)(3) that requires the categorical exclusion of statements of that sort. Instead, the Rule is designed to permit the admission of any statement that is truly against the declarant's penal interest, in light of all the circumstances.

1. The rule against the admission of hearsay evidence reflects the traditional understanding that "many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed * * * by the test of cross-examination." 5 J. Wigmore, *Evidence* § 1420, at 251 (J. Chadbourn rev. ed. 1974). The law, however, recognizes exceptions to the hearsay rule where "statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and * * * the circumstances surrounding the making of the statement [therefore] provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous." *Idaho* v. *Wright*, 497 U.S. 805, 820 (1990) (discussing the "excited utterance," "dying declaration," and "medical treatment" exceptions to the hearsay rule). See also, *e.g.*, *White* v. *Illinois*, 112 S. Ct. 736, 742 n.8 (1992).

Rule 804(b)(3) is an exception to the hearsay rule. It authorizes the admission of an out-of-court statement by an unavailable declarant if the statement, at the time of its making, was "so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the

statement unless believing it to be true."[2]

The exception for statements against penal interest is founded on "the principle of experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect, and is thus sufficiently sanctioned, though oath and cross-examination are wanting." 5 J. Wigmore, *supra*, § 1457, at 329. As this Court recently explained:

> It is against self-interest to admit one's own criminal liability * * * and so all the more easy to credit when it happens. This principle underlies the elemental rule of evidence which permits the introduction of admissions, despite their hearsay character, because we assume "that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true."

Masson v. *New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2430 (1991) (quoting Fed. R. Evid. 804 advisory committee note, 28 U.S.C. App. at 789). As in the case of other exceptions to the hearsay rule, therefore, a central premise of the statement-against-penal-interest exception is that the nature of the statement and the circumstances surrounding it provide a sufficient warranty of its reliability. In fact, Rule 804(b)(3) provides an even more direct guarantee of reliability than is provided by other hearsay exceptions, because the exception is not triggered simply by the fact that the statement is against the declarant's interest; instead, it requires that the trial court find the statement to be so clearly contrary to the declarant's interest,

---

[2] Rule 804(b)(3) imposes an additional condition on the admission of statements against penal interest when those statements are offered to exculpate a defendant in a criminal case: such statements are not admissible, the Rule provides, "unless corroborating circumstances clearly indicate the trustworthiness of the statement."

under all the circumstances, that a reasonable person would not have made the statement unless he believed it to be true.

There is nothing about an accomplice's post-arrest statement that categorically precludes it from satisfying the elements of Rule 804(b)(3). In some cases, of course, an accomplice's confession will actually be *in* his penal interest and therefore not admissible under the Rule. For example, if the declarant is a suspect in a case of assault with intent to kill, and his confession includes the fact that his co-defendant fired the shot, the confession may to that extent serve the declarant's penal interest by attempting to shift blame for the assault itself. See *Douglas* v. *Alabama,* 380 U.S. 415, 417, 420 (1965). There will also be circumstances, however, in which a defendant inculpates a third party in a way that is clearly *against* his penal interest. For example, if the declarant tells the police during interrogation that he took perpetrators of an armed robbery into his home after the robbery, the declarant has admitted to being an accessory to the crime. Absent some reason to think the declarant was seeking to shift blame or curry favor by making that admission, a trial court would be justified in finding that a reasonable person in the declarant's position would not have made a statement describing his conduct unless he believed it to be true. See *People* v. *Gordon,* 792 P.2d 251, 265-269 (Cal. 1990), cert. denied, 499 U.S. 913 (1991); see also *United States* v. *Garris,* 616 F.2d 626, 631 (2d Cir.), cert. denied, 447 U.S. 926 (1980). The question whether the statement was truly against the declarant's interest is therefore a highly factual one that resists categorical answers based simply on whether the declarant makes a post-arrest statement to the authorities that is offered against an alleged accomplice.[3]

[3] The Second Circuit's decision in *United States* v. *Scopo,* 861 F.2d 339, 348-349 (1988) (statement against penal interest made during plea allocution under Fed. R. Crim. P. 11), certs. denied, 490 U.S. 1022 and 490 U.S. 1048 (1989), illustrates the importance of examining the precise circumstances in which a statement was made (861 F.2d at 348 (citations omitted)):

> In general a plea of guilty is a statement against the penal interest of the pleader for the obvious reason that it exposes him to criminal liability. Likewise, so much of the allocution as states that that defendant committed or participated in the commission of a crime, thereby permitting the court to accept the plea, is normally against his interest. If, however, a pleading defendant had an agreement with the government or with the court that he would not be punished for the crimes to which he allocuted, then that allocution would not subject him to criminal liability and would not constitute a statement against his penal interest within the meaning of Rule 804(b)(3).

This Court has cautioned that an accomplice's inculpatory confession should be treated with suspicion because it "may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Lee* v. *Illinois,* 476 U.S. 530, 545 (1986). See also *Bruton* v. *United States,* 391 U.S. 123, 136 (1968). But the Court has never treated that concern as a basis for holding that inculpatory confessions are categorically excluded from admission under the hearsay exception in Rule 804(b)(3) or under the Confrontation Clause. In fact, this Court's cases construing the Confrontation Clause, which addresses concerns similar to those underlying the hearsay rule, see *White* v. *Illinois,* 112 S. Ct. at 741, hold that the reliability of such confessions turns on the totality of the circumstances surrounding the particular statement sought to be admitted.

In *Lee* v. *Illinois, supra,* for example, this Court held that the admission of a nontestifying co-defendant's inculpatory confession violated the Confrontation Clause. Significantly, the Court did not apply a per se rule barring the admission of all such confessions. Instead, the Court

carefully analyzed the particular circumstances surrounding the confession in that case in determining its admissibility under the Confrontation Clause.

Lee involved two murders in which both defendants were implicated. As the Court emphasized, the nontestifying co-defendant, Edwin Thomas, had refused to talk to the police until after being told that the defendant, Millie Lee, "had already implicated him and only after he was implored by Lee to share 'the rap' with her." 476 U.S. at 544. The Court also emphasized that Thomas had more than "a theoretical motive" to distort his account of the events; the record reflected that prior to trial he had been "actively considering the possibility of becoming [Lee's] adversary * * * [by] becoming a witness for the State." *Ibid.* Finally, the Court noted that there were significant discrepancies in the two defendants' stories relating to the roles that each played in the murder and to the issue of premeditation. *Id.* at 545-546. Under those circumstances, the Court determined that Thomas's inculpatory confession was not sufficiently reliable to be admitted over a Confrontation Clause objection.

Lee does not support adoption of a categorical rule of inadmissibility for accomplice confessions that implicate the defendant; indeed, the analysis in *Lee* supports just the opposite approach. If a nontestifying co-defendant's inculpatory confessions were always deemed too unreliable to be admitted without cross-examination, the Court in *Lee* would have had no reason to examine the precise circumstances surrounding Thomas's confession. *Lee* therefore suggests that the reliability of such a statement depends on the totality of the circumstances, including the substance of the statement and the setting in which it was made. Although the Court in *Lee* characterized co-defendants' confessions as "presumptively unreliable" and "presumptively suspect," 476 U.S. at 539, 541, the Court

did not hold (and has never held) such confessions "*per se* inadmissible under the Confrontation Clause," *id.* at 552 (Blackmun, J., dissenting); nor has the Court suggested that such statements may not be found to be reliable when they are genuinely against the declarant's penal interest. See *New Mexico* v. *Earnest*, 477 U.S. 648, 649 (1986) (Rehnquist, J., concurring).[4]

2. The Advisory Committee Note accompanying Rule 804(b)(3) makes clear that the Rule was designed to adopt a case-by-case approach to the admission of statements by a nontestifying accomplice that inculpate the defendant. The Advisory Committee made that point clear in its discussion of this Court's pre-Rule decisions in *Douglas* v. *Alabama, supra,* and *Bruton* v. *United States, supra.* *Douglas* held that it was error to place before the jury a co-defendant's confession implicating the defendant as the trigger man in a case charging both defendants with assault with intent to kill. In *Bruton,* the Court held that the trial court abused its discretion by not severing a trial in which the government introduced the inculpatory confession of a co-defendant. Although the inadmissibility of the confession was uncontested in *Bruton,* and the only question in the case was whether a limiting instruction was sufficient to ensure that the jury did not consider the confession against both defendants, the Court noted in passing that the confession did not qualify for admission

---

[4] The plurality opinion in *United States* v. *Harris,* 403 U.S. 573, 575-576 (1971), provides further support for the view that statements against penal interest by an accomplice can be reliable under appropriate circumstances. In that case, an informant's statement that he had purchased illegal whiskey from the defendant was used to establish probable cause. A plurality of the Court found the informant's statements reliable, even though the statements consisted of an admission of guilt, made to law enforcement agents, that implicated another in the same criminal activity.

under any recognized hearsay exception. 391 U.S. at 128 n.3.[5]

The Advisory Committee Note to Rule 804(b)(3) expresses the view that *Douglas* and *Bruton* "by no means require that all statements implicating another person be excluded from the category of declarations against interest." Fed. R. Evid. 804 advisory committee note, 28 U.S.C. App. at 790. Instead of a categorical approach, the Committee offered the following framework for evaluating inculpatory statements against penal interest (*ibid.*):

> Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. * * * On the other hand, the same words spoken under different circumstances, *e.g.*, to an acquaintance, would have no difficulty in qualifying.

That passage confirms that the penal interest determination under Rule 804(b)(3) is to be made on a case-by-case basis and that the Federal Rules of Evidence were not meant to adopt a per se approach to determining whether a statement is genuinely against a declarant's penal interest.[6]

---

[5] The Court in *Bruton* did not reach the question whether admitting the confession would offend the Confrontation Clause. 391 U.S. at 128 n.3.

[6] The drafting and legislative history of Rule 804(b)(3) likewise demonstrates that Congress did not intend to adopt a per se rule of exclusion for accomplice confessions. A preliminary version of the Rule provided that the hearsay exception for statements against interest did "not include a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused." *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates,* 46 F.R.D. 161, 378 (1969). When this Court issued the official draft of the Federal Rules of Evidence, however, it omitted that restriction from Rule 804(b)(3), and the accompanying Advisory Committee Note explained that such inculpatory statements could qualify as statements against interest within the meaning of the Rule. See *Rules of Evidence for United States Courts and Magistrates,* 56 F.R.D. 183, 321, 327-328 (1972). Although the House of Representatives sought to bar the admission of inculpatory statements against penal interest, see H.R. Rep. No. 650, 93d Cong., 1st Sess. 16 (1973), the Senate rejected that limitation on the relevant hearsay exception, see S. Rep. No. 1277, 93d Cong., 2d Sess. 21-22 (1974). The Senate's view prevailed in conference, and the Conference Report explained that "[t]he Conferees agree[d] to delete the provision regarding statements by a co-defendant, thereby reflecting the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles." H.R. Conf. Rep. No. 1597, 93d Cong., 2d Sess. 12 (1974). Contrary to petitioner's argument (Br. 32), that explanation does not suggest an intention to leave the deleted restriction in place; rather, it reflects an intention not to impose any such restriction on the scope of the Rule.

Consistent with those principles, reviewing courts have on numerous occasions upheld the admission of inculpatory statements made to the police by accomplices, but only after satisfying themselves that the statements were genuinely against the declarant's penal interest. For example, in *United States* v. *Coachman,* 727 F.2d 1293 (D.C. Cir. 1984), the defendant was charged with defrauding the government; an accomplice pleaded guilty prior to trial but refused to testify against the defendant. Applying Rule 804(b)(3), the court of appeals approved the admission against the defendant of "a Secret Service agent's recapitulation of an inculpatory statement made by [the accomplice] after his arrest." 727 F.2d at 1296. The court recognized that "[w]hether a statement is in fact against interest depends upon the circumstances of the particular case." *Ibid.* Although it was "mindful * * * that an in-custody statement which inculpates another as well as the speaker

may have been made with a view to currying favor with law-enforcement authorities," *ibid.*, it found no such danger in the accomplice's confession: His "version [of the crime] did not attempt to trivialize his own involvement in the nefarious scheme by shifting responsibility to his cohorts; rather, it frankly disclosed the extent of his own participation without any effort to demonstrate that others were really the ones to blame." *Id.* at 1297. Thus, the court concluded, the rule was satisfied because the accomplice's statement was genuinely against his penal interest. *Ibid.*[7]

Even when they have found that particular statements did not satisfy the requirements of Rule 804(b)(3), the courts of appeals have ordinarily embraced the same basic approach to the Rule. Thus, when the courts have refused to admit evidence as statements against penal interest, it has not been because they have concluded that statements

[7] See also, *e.g.*, *United States* v. *Garcia*, 897 F.2d 1413, 1420-1421 (7th Cir. 1990) (co-defendant's post-arrest statement to authorities that he and defendant were both involved in drug conspiracy); *United States* v. *Koskerides*, 877 F.2d 1129, 1135-1136 (2d Cir. 1989) (statement made in Greece by defendant's father-in-law to FBI agent implicating himself and defendant in violation of Greek and American law); *United States* v. *Carruth*, 699 F.2d 1017, 1022-1023 (9th Cir. 1983) (statement of defendant's accountant to IRS agent implicating himself and defendant in tax fraud), cert. denied, 464 U.S. 1038 (1984); *United States* v. *Robinson*, 635 F.2d 363, 364 (5th Cir.) (non-custodial statement by co-defendant to FBI agents implicating both co-defendant and defendant in drug conspiracy; declarant received "no promises" or reason to expect leniency and made no effort "to shift the balance [of culpability] elsewhere"), cert. denied, 452 U.S. 916 (1981); *United States* v. *Scopo*, 861 F.2d at 348-349 (upholding admission of co-defendant's Fed. R. Crim. P. 11 colloquy that implicated defendant); *United States* v. *Winley*, 638 F.2d 560, 562 (2d Cir. 1981) (same), cert. denied, 455 U.S. 959 (1982); cf. *Jennings* v. *Maynard*, 946 F.2d 1502, 1504-1506 (10th Cir. 1991) (upholding admission under Okla. Stat. Ann. tit. 12, § 2804(B)(3) of statement of robbery victim's son-in-law to state police officer that he had told the defendant about the floor plan of the victim's home).

against penal interest by an accomplice are invariably unreliable; instead, it has been because the statements were not sufficiently contrary to the declarant's penal interest, in the circumstances of a particular case, that a reasonable person would not have made them unless he believed them to be true.[8]

In sum, a ruling on the admissibility of evidence under Rule 804(b)(3) calls for an inquiry that depends heavily on the circumstances of the particular case. The determination whether a statement was genuinely against the declarant's penal interest—like the determination whether something is an "excited" utterance, Fed. R. Evid. 803(2), or whether a statement was made "under belief of impending death," Fed. R. Evid. 804(b)(2)—is a "[p]reliminary question[ ]" concerning admissibility, to be "determined by the [trial] court" under Fed. R. Evid. 104(a). See 4 D. Louisell & C. Mueller, *Federal Evidence* § 489, at 1132-1133 & n.66 (1980) (citing cases). If the proponent of the statement establishes by a preponderance of the evidence (see *Bourjaily* v. *United States*, 483 U.S. 171, 175-176 (1987)) that a declarant is unavailable and that his statement was truly against his penal interest, the plain

[8] See, *e.g.*, *United States* v. *Magna-Olvera*, 917 F.2d 401, 407-409 (9th Cir. 1990) (statements were not sufficiently against declarant's penal interest where they were made in custody after the government suggested that he could halve his prison time for cooperation, and where the statements "trivialized [the declarant's] role in the drug conspiracy"); *United States* v. *Johnson*, 802 F.2d 1459, 1465 (D.C. Cir. 1986) (holding inadmissible teenager's post-arrest statement trivializing his own role in narcotics offense and implicating an older man and store owner as "the kingpin in a drug operation"); *United States* v. *Palumbo*, 639 F.2d 123, 127-128 (3d Cir.) (excluding statements based on "the totality of 'circumstances of [this] case' "), cert. denied, 454 U.S. 819 (1981); *United States* v. *Love*, 592 F.2d 1022, 1025 (8th Cir. 1979) (finding that declarant's statements did not subject her to criminal liability); *United States* v. *Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977) (declarant had been convicted and given immunity when he made statements at issue).

language of Rule 804(b)(3) makes the statement admissible over a hearsay objection.

B. Harris's Statements To The Interviewing Agent Were Genuinely Against His Penal Interest

The district court's finding (J.A. 51-52) that Harris's statements were against his penal interest within the meaning of Rule 804(b)(3) is fully supported by the record.[9] When Harris spoke to Agent Walton, he knew that his statements could be used to prosecute him for drug offenses. Nonetheless, during every conversation with Agent Walton, Harris acknowledged his role in the offense. Furthermore, although the cocaine was found in a suitcase bearing someone else's initials, and the rental agreement listed petitioner as an additional driver, Harris made no attempt to deny responsibility for the cocaine. Contrary to petitioner's contention (Br. 26, 43-44), Harris's statements did more than merely confirm what authorities already knew about his involvement in the offense. If Harris had wanted to minimize his role in the offense and shift blame to petitioner, he could easily have claimed that he had no knowledge of the contents of the suitcase in the trunk of the rental car, and that he had consented to a search of the trunk because he had no idea that it contained cocaine.

During his second conversation with Agent Walton, Harris again made no effort to minimize his role in the offense. Harris recounted in detail the role he played in transporting the drugs from Florida to Georgia, again

[9] It is undisputed that Harris was unavailable to testify and thus that the "unavailability" requirement of Rule 804 was satisfied here. On the government's motion, Harris's trial was severed from petitioner's, and Harris was granted immunity pursuant to 18 U.S.C. 6001 *et seq.* Harris nonetheless refused to testify at petitioner's trial, even after being held in contempt. J.A. 9-15.

subjecting himself to criminal liability for possession and conspiracy to possess cocaine with intent to distribute it. J.A. 38-39. Although Walton had advised Harris that he would report any cooperation to the Assistant United States Attorney, Harris made his statements without any promise of reward for cooperating with the authorities. J.A. 25-26. Moreover, Harris did not pursue the possibility of cooperation either when he spoke with Walton or afterwards.

There is no suggestion in the record that Harris had any motive or desire to implicate petitioner falsely. To the contrary, Harris was reluctant to implicate petitioner, because he believed that petitioner would retaliate against him or his family. J.A. 68. He was concerned that his statements about petitioner would be recorded, and he refused to sign a written statement. J.A. 24-25. And when he subsequently refused to testify against petitoner he was held in contempt of court for his refusal to do so. See J.A. 9-15.[10]

The circumstances under which Harris subsequently revised his story provide additional support for the district court's finding that his statements were reliable. Harris initially told Agent Walton that he obtained the cocaine from an unidentified Cuban and had been instructed to leave it in a dumpster. That version of the story concealed petitioner's role in accompanying the cocaine during its transportation and concealed the fact that the cocaine was to be delivered to petitioner. When Agent Walton was leaving the interview area to arrange for a controlled delivery of the cocaine to the dumpster that Harris had described,

[10] Petitioner is mistaken in contending (Br. 27) that Harris's refusal to have his statements recorded and his refusal to repeat them at trial indicated that he was effectively recanting the statements he made to Agent Walton. The much more compelling inference is that Harris was afraid to repeat his statements or have them recorded because he feared retaliation from petitioner.

Harris stood up and blurted out, "I can't let you do that." J.A. 40. He then threw up his hands and said, "that's not true, I can't let you go up there for no reason." *Ibid.* Harris then explained that he was delivering the cocaine to petitioner in Atlanta; that petitioner was driving in front of him and had seen the police stop and search the car; and that a controlled delivery would therefore be impossible. J.A. 40-41.

Under those circumstances, it was highly likely that Harris "would not have made the statement" he made to Agent Walton "unless believing it to be true." Fed. R. Evid. 804(b)(3). When Harris's initial story was going to be put to the test, he spontaneously declared that he had given a false account of the details of the scheme in which he was involved and he provided a revised version. Yet the revised version did not minimize Harris's own role in the drug distribution conspiracy. Like his initial account, the new story had Harris deeply involved in the conspiracy, and it implicated petitioner without seeking to shift responsibility to him. The fact that Harris altered his story when it was on the point of being put to the test strongly indicates that he did not make the statements he did because he wanted to exculpate himself or advance his negotiating position, but that he told the truth because the agents were about to catch him in a falsehood.

This case is therefore different from *Lee* v. *Illinois, supra,* on which petitioner relies heavily. Br. 40-41. As discussed, the declarant in *Lee* inculpated the defendant only after he learned that the defendant had implicated him in a murder case. 476 U.S. at 533, 544. The declarant, moreover, considered becoming a witness for the State at the time he implicated the defendant. *Id.* at 544. The declarant therefore had a powerful motive "either to mitigate the appearance of his own culpability by spreading the blame

or to overstate Lee's involvement in retaliation for her having implicated him." *Ibid.*

In contrast, Harris never attempted to gain anything in return for his confession in this case. Although Agent Walton promised to relay any cooperation to the Assistant United States Attorney, J.A. 25-26, Harris did not seek to engage in any plea bargaining before he spoke to Agent Walton or indicate that he would be willing to testify against petitioner. Nor is there any indication that Harris had a motive to seek revenge against petitioner by implicating him falsely. To the contrary, Harris demonstrated reluctance to name petitioner as the source of the cocaine and set out petitioner's full involvement in the scheme, until it became evident that he had no other practical choice. J.A. 68.

C. The Portions Of Harris's Statements That Inculpated Petitioner Were Properly Admitted Along With The Portions That Inculpated Harris

Petitioner argues (Br. 39-41) that the district court should have held inadmissible the portions of Harris's statements that inculpated petitioner. That argument is contrary to the principles underlying Rule 804(b)(3). The Advisory Committee explained that a "third-party confession * * * may include statements implicating [the accused], and under the general theory of declarations against interest they would be admissible as related statements." Fed. R. Evid. 804 advisory committee note, 28 U.S.C. App. at 790. That observation reflects the common-sense proposition that when the part of a statement implicating the defendant is integral to the parts of the statement that are against the declarant's interest, then both parts of the statement are admissible. See, *e.g.*, *United States* v. *Lieberman,* 637 F.2d 95, 103 (2d Cir. 1980); *United States* v. *Barrett,* 539 F.2d 244, 252-253

(1st Cir. 1976). See also, *e.g.*, 2 *McCormick on Evidence* § 319, at 345 (J. Strong ed., 4th ed. 1992) ("When the statement incriminates both the declarant and the accused and is offered by the prosecution against the accused * * * the trend in the federal cases is to admit the entire statement if the two parts are reasonably closely connected.").

Harris's statements implicating petitioner were integrally related to his self-incriminating statements. Harris admitted his involvement in a drug distribution conspiracy that involved his picking up cocaine in Fort Lauderdale and delivering it to petitioner (his co-conspirator) in Atlanta. Harris could not have accurately described the nature of the conspiracy or his role in the offense without implicating petitioner. The references to petitioner were thus so closely linked to the description of the conspiracy that the admission of that part of his statement against interest was entirely appropriate under Rule 804(b)(3). See *United States* v. *Casamento,* 887 F.2d 1141, 1171 (2d Cir. 1989), cert. denied, 493 U.S. 1081 (1990).

II. STATEMENTS ADMITTED AS DECLARATIONS AGAINST PENAL INTEREST SATISFY THE CONFRONTATION CLAUSE BECAUSE THEY FALL WITHIN A "FIRMLY ROOTED" HEARSAY EXCEPTION

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." Although the Clause expresses a "preference for face-to-face accusation," *Ohio* v. *Roberts,* 448 U.S. 56, 65 (1980), it does not prohibit the admission of all out-of-court statements. Rather, the Clause countenances the admission of those out-of-court statements that have sufficient "indicia of reliability" to justify dispensing with face-to-face confrontation and cross-examination of the declarant. *Ibid.* Reliability can be

inferred without more, the Court has explained, in a case in which the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded absent a showing that the statement in question carries particularized guarantees of trustworthiness. *Id.* at 66.[11] See also *White* v. *Illinois,* 112 S. Ct. at 743; *Idaho* v. *Wright,* 497 U.S. at 814-815.

1. In general, if a hearsay exception reflects a long-standing tradition and is widely accepted in current law, it qualifies as a "firmly rooted" exception for purposes of the Confrontation Clause. See, *e.g., White* v. *Illinois,* 112 S. Ct. at 742 n.8 (state hearsay exception for spontaneous declarations was "firmly rooted" because it is "at least two centuries old" and is "currently recognized under the Federal Rules of Evidence, Rule 803(2), and in nearly four-fifths of the States"); *Bourjaily* v. *United States,* 483 U.S. at 183 (hearsay exception in Fed. R. Evid. 801(d)(2)(E) for declaration of a co-conspirator is "firmly rooted" because it is "steeped in our jurisprudence" and because such statements "have a long tradition of being outside the compass of the general hearsay exclusion").

This Court has recognized, however, that the category of "firmly rooted" hearsay exceptions is not limited to rules

---

[11] There are several reasons for that distinction. First, "[a]dmission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." *Idaho* v. *Wright,* 497 U.S. at 817. Second, the hearsay rules and the Confrontation Clause "are generally designed to protect similar values," and "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.' " *Ohio* v. *Roberts,* 448 U.S. at 66. Third, admitting evidence pursuant to a "firmly rooted" hearsay exception "responds to the need for certainty in the workaday world of conducting criminal trials." *Ibid.*

of evidence with a long history. "True to the common-law tradition, the process [of accommodating competing interests under the Confrontation Clause] has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions." *Ohio* v. *Roberts,* 448 U.S. at 64. This Court has therefore been willing to find a hearsay exception "firmly rooted" because of its widespread modern acceptance, without reference to how long ago the exception was first recognized. See *White* v. *Illinois,* 112 S. Ct. at 742 n.8 (hearsay exception for statements made for purposes of medical diagnosis or treatment is "firmly rooted" because it is "recognized in the Federal Rules of Evidence, Rule 803(4), and is * * * widely accepted among the States"). See also *Idaho* v. *Wright,* 497 U.S. at 817 (statements within "established hearsay exceptions possess the imprimatur of judicial and legislative experience") (internal quotation marks omitted); *Lee* v. *Illinois,* 476 U.S. at 552 (Blackmun, J., dissenting).[12]

2. The hearsay exception for statements against penal interest relied on by the courts below is a "firmly rooted" hearsay exception. First, it is found in the Federal Rules of Evidence, which this Court submitted to Congress and Congress enacted into law. In addition, a majority of the States have adopted statutes or rules identical or substantially similar to Rule 804(b)(3),[13] and courts in several

[12] It is assuredly relevant if a hearsay exception was part of the legal background against which the Confrontation Clause was adopted (see *Mattox* v. *United States,* 156 U.S. 237, 243 (1895)), and the long-standing character of an evidentiary rule plainly supports the determination that an exception is firmly rooted. See, *e.g., White* v. *Illinois,* 112 S. Ct. at 742 n.8. But those characteristics are not essential to sustain the classification of a hearsay exception as "firmly rooted."

[13] See Alaska R. Evid. 804(b)(3); Ariz. R. Evid. 804(b)(3); Cal. Evid. Code § 1230 (West 1966); Colo. R. Evid. 804(b)(3); Del. Unif. R. Evid. 804(b)(3); Fla. Stat. Ann. § 90.804(2)(c) (West Supp. 1994);

other jurisdictions have adopted similar approaches that permit statements against penal interest to be admitted in some circumstances.[14] Although the approach of the Federal Rules of Evidence has not been universally accepted,[15] it nevertheless reflects a strong majority view.[16]

Haw. R. Evid. 804(b)(3); Idaho R. Evid. 804(b)(3); Iowa R. Evid. 804(b)(3); Kan. Stat. Ann. § 60-460(j) (Supp. 1992); La. Code Evid. Ann. art. 804(B)(3) (West 1994); Mich. R. Evid. 804(b)(3); Minn. R. Evid. 804(b)(3); Miss. R. Evid. 804(b)(3); Mont. R. Evid. 804(b)(3); Neb. Rev. Stat. § 27-804(2)(c) (1989); N.H. R. Evid. 804(b)(3); N.M. R. Evid. 11-804(b)(4); Ohio R. Evid. 804(b)(3); Okla. Stat. Ann. tit. 12, § 2804(B)(3) (West 1993); Or. Rev. Stat. § 40.465(3)(c) (1989); R.I. R. Evid. 804(b)(3); S.D. Codified Laws Ann. § 19-16-32 (1987); Tenn. R. Evid. 804(b)(3); Utah R. Evid. 804(b)(3); W. Va. R. Evid. 804(b)(3); Wis. R. Evid. 908.045(4); Wyo. R. Evid. 804(b)(3). Several other States allow the admission of statements against penal interest but require all such statements to be corroborated when admitted in a criminal case. N.C. R. Evid. 804(b)(3); Tex. R. Crim. Evid. 803(24); Wash. R. Evid. 804(b)(3). Kentucky requires such corroborating circumstances in civil and criminal cases. Ky. R. Evid. 804(b)(3).

[14] See, *e.g., Laumer* v. *United States,* 409 A.2d 190, 199 (D.C. 1979) (en banc); *Commonwealth* v. *Carr,* 369 N.E.2d 970, 972-974 (Mass. 1977); *Agnew* v. *State,* 446 A.2d 425, 432-433 (Md. Ct. Spec. App. 1982).

[15] A minority of the States have adopted rules that expressly exclude the statements of an accomplice implicating a defendant. See Ark. R. Evid. 804(b)(3); Me. R. Evid. 804(b)(3); Nev. Rev. Stat. Ann. § 51.345 (Michie 1986); N.D. R. Evid. 804(b)(3); Vt. R. Evid. 804(b)(3). In addition, courts in several other States have shown reluctance to admit such statements. See, *e.g., Crowder* v. *State,* 227 S.E.2d 230, 239 (Ga. 1976). Some States categorically refuse to allow statements against penal interest to be admitted against an accused. See, *e.g., Flowers* v. *State,* 586 So. 2d 978, 987 (Ala. Crim. App.), cert. denied, 596 So. 2d 954 (Ala. 1991), cert. denied, 112 S. Ct. 1995 (1992); *State* v. *Leisure,* 838 S.W.2d 49, 57 (Mo. Ct. App. 1992).

[16] Petitioner contends (Br. 20 n.5) that in *State* v. *Hansen,* 312 N.W.2d 96 (Minn. 1981), the Minnesota Supreme Court construed a state rule similar to Fed. R. Evid. 804(b)(3) to exclude inculpatory

Accordingly, it is not surprising that most of the courts of appeals to have considered the issue have held that the hearsay exception for statements against penal interest is "firmly rooted."[17]

Petitioner argues (Br. 17-18) that the hearsay exception for declarations against penal interest is too recent in origin to be "firmly rooted." As we have noted, however, a hearsay exception may be firmly rooted because of its widespread acceptance in contemporary law. See *White* v. *Illinois,* 112 S. Ct. at 742 n.8 (statements made for the

---

statements by accomplices. That decision, however, merely held that a statement made under promise of a reduced charge was not against the declarant's penal interest. See 312 N.W.2d at 100-101. He also claims (Br. 20 n.5) that *State* v. *Abourezk,* 359 N.W.2d 137 (S.D. 1984), generally excludes inculpatory admissions of accomplices under a similar rule. That decision, however, also turned on the specific circumstances surrounding the declarant's statement. *Id.* at 142. Petitioner likewise errs in suggesting (Br. 20 n.5) that California refuses to allow the admission of post-arrest inculpatory statements against penal interest. See *People* v. *Gordon,* 792 P.2d 251, 265-269 (Cal. 1990), cert. denied, 499 U.S. 913 (1991).

[17] See, *e.g., United States* v. *Seeley,* 892 F.2d 1, 2 (1st Cir. 1989); *United States* v. *Katsougrakis,* 715 F.2d 769, 776 (2d Cir. 1983), cert. denied, 464 U.S. 1040 (1984); *United States* v. *York,* 933 F.2d 1343, 1363 (7th Cir.), cert. denied, 112 S. Ct. 321 (1991); *Berrisford* v. *Wood,* 826 F.2d 747, 751 (8th Cir. 1987), cert. denied, 484 U.S. 1016 (1988); *Jennings* v. *Maynard,* 946 F.2d 1502, 1505-1506 (10th Cir. 1991); *United States* v. *Taggart,* 944 F.2d 837, 840 (11th Cir. 1991). But cf. *Morrison* v. *Duckworth,* 929 F.2d 1180, 1181 n.2 (7th Cir. 1991) (indicating that statements against penal interest are not admissible if they seek to "cast blame on" others); *United States* v. *Bakhtiar,* 994 F.2d 970, 977-978 (2d Cir.) (noting that the court of appeals had "previously held that the penal interest exception is firmly rooted" but acknowledging that "[s]ome recent cases cast some doubt on this conclusion, * * * and the Supreme Court has not addressed the question"), cert. denied, 114 S. Ct. 554 (1993). Only the Fifth Circuit has squarely held that the exception is not firmly rooted. See *United States* v. *Flores,* 985 F.2d 770 (1993).

purpose of medical diagnosis). In any event, the origins of the hearsay exception for declarations against penal interest go back much farther than petitioner suggests.

Courts in England began to admit statements against a declarant's financial or pecuniary interest "shortly after the hearsay rule was established." 5 J. Wigmore, *supra,* § 1476, at 350. Prior to the mid-19th century, English courts also admitted statements against a declarant's penal interest. *Id.* at 350-351 & n.8 (collecting authorities). See also Note, 13 Va. L. Rev. 41, 42 & n.5 (1927).

By the early 1800s, the trend was in favor of admitting declarations against interest in general. See 5 J. Wigmore, *supra,* § 1476, at 350. In 1844, however, the House of Lords decided the *Sussex Peerage Case,* 11 Cl. & F. 85, 110, in which

> a backward step was taken and an arbitrary limit put upon the rule. It was held to exclude the statement of a fact subjecting the declarant to a *criminal liability,* and to be confined to statements of *facts against either pecuniary or proprietary interest.* Thenceforward this rule was accepted in England, although it was plainly a novelty at the time of its inception; for in several rulings up to that time statements of criminal facts had been received.

5 J. Wigmore, *supra,* § 1476, at 351 (footnotes omitted).

The *Sussex Peerage Case* was widely followed in this country in the second half of the 19th century. See 5 J. Wigmore, *supra,* § 1476, at 352 n.9; Morgan, *Declarations Against Interest,* 5 Vand. L. Rev. 451, 473 (1952). Commentators, however, "almost universally" condemned the distinction drawn between statements against penal interest and the other kinds of statements against interest, see Note, *Declarations Against Penal Interest: Standards of Admissibility Under an Emerging*

Majority Rule, 56 B.U. L. Rev. 148, 152 (1976),[18] and courts "demonstrated striking ingenuity" in discovering ways to bring statements against penal interest within the hearsay exception for statements against pecuniary or proprietary interest. Fed. R. Evid. 804 advisory committee note, 28 U.S.C. App. at 789; see, *e.g.*, Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule,* 58 Harv. L. Rev. 1, 40 & nn.94-96 (1944); Morgan, 5 Vand. L. Rev. at 474-475; *Aetna Life Ins. Co.* v. *Strauch,* 67 P.2d 452, 455 (Okla. 1937) (admitting declarant's confession to murder on the ground that it would have prevented him from recovering insurance on the victim), *overruled by Howard* v. *Jessup,* 519 P.2d 913, 917 (Okla. 1973) (recognizing hearsay exception for statements against penal interest); *Weber* v. *Chicago, R.I. & P. Ry.,* 151 N.W. 852, 864 (Iowa 1915) (declarations were "against [the declarant's] pecuniary interest, for they were of such a nature as to constitute the basis of an action against him for damages as well as exposing him to criminal prosecution").

In *Donnelly* v. *United States,* 228 U.S. 243 (1913), this Court followed the rule then prevailing in the States and held that the federal hearsay exception for statements against interest did not extend to statements against penal interest. *Id.* at 272-277. The Court sustained the decision not to admit the declarant's out-of-court confession to the murder for which the defendant had been convicted. More influential than the majority opinion in the long run,

[18] See, *e.g.*, Comment, 1 Cal. L. Rev. 475, 476 (1913); Comment, 9 Cornell L. Q. 57, 59 (1924); Recent Case, 37 Harv. L. Rev. 156, 156-157 (1924); Comment, 10 Va. L. Rev. 83, 84 (1924); Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule,* 58 Harv. L. Rev. 1, 40 (1944); Morgan, 5 Vand. L. Rev. at 463; 2 *McCormick on Evidence, supra,* § 318, at 340.

however, was Justice Holmes' dissent, which reasoned (*id.* at 277-278):

> The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law. There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man.

Following Justice Holmes' reasoning in *Donnelly,* several States subsequently recognized hearsay exceptions for statements against penal interest.[19] By 1976, no fewer than 21 States allowed the admission of statements against penal interest. See Note, 56 B.U. L. Rev. at 149 n.5. And by the time the Federal Rules of Evidence were being proposed and adopted, Members of this Court had already begun to pull back from *Donnelly*'s broad reasoning in a series of cases raising similar issues. See *Dutton* v. *Evans,* 400 U.S. 74, 76-81, 89 (1970) (plurality opinion) (allowing admission of post-conspiracy statement of co-conspirator under Georgia hearsay exception; noting that there were sufficient "indicia of reliability" to satisfy the Confrontation Clause because the statement "was spontaneous, and it was against [the declarant's] penal interest to make it"); *United States* v. *Harris,* 403 U.S. 573, 583-584 (1971)

[19] Most, but not all, of those decisions, like *Donnelly,* involved statements exculpating a criminal defendant, such as third-party confessions. See, *e.g.*, *Hines* v. *Commonwealth,* 117 S.E. 843, 847-849 (Va. 1923); *Osborne* v. *Purdome,* 250 S.W.2d 159, 162-163 (Mo. 1952); *People* v. *Spriggs,* 389 P.2d 377, 378-381 (Cal. 1964) (Traynor, J.).

(plurality opinion) (noting that *Donnelly* "has been widely criticized * * * and has been partially rejected in Rule 804 of the Proposed Rules of Evidence");[20] *United States* v. *Matlock*, 415 U.S. 164, 176 (1974) (declarant's out-of-court statements "were against her penal interest and they carried their own indicia of reliability"). See also *Lee* v. *Illinois*, 476 U.S. at 551 (Blackmun, J., dissenting) ("The hearsay exception for declarations against [penal] interest is firmly established.").[21]

[20] The plurality in *Harris* added (403 U.S. at 583-584):

> Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a "break" does not eliminate the residual risk and opprobrium of having admitted criminal conduct.

[21] *Douglas* v. *Alabama*, *supra*, and *Bruton* v. *United States*, *supra*, are not to the contrary. As discussed, the out-of-court statement in *Douglas* was not against the declarant's penal interest because it sought to establish his co-defendant as the trigger man in a shooting. In *Bruton*, the government conceded that the confession of a co-defendant was inadmissible against Bruton, and the only question in the case was whether the jury was able to follow the trial court's instruction to disregard that confession as to Bruton. The holdings of those decisions do not foreclose the determination that statements against penal interest may be admitted under an exception to the hearsay rule. See, *e.g.*, Fed. R. Evid. 804 advisory committee note, 28 U.S.C. App. at 790; *Lee* v. *Illinois*, 476 U.S. at 552 n.5 (Blackmun, J., dissenting); *Cruz* v. *New York*, 481 U.S. 186, 192-193 (1987).

Petitioner argues (Br. 15-16) that in *Lee* v. *Illinois*, *supra*, this Court held that the hearsay exception for declarations against penal interest is not firmly rooted. The Court in *Lee*, however, merely observed: "We reject [the State's] categorization of the hearsay involved in this case as a simple 'declaration against penal interest.' That concept

Petitioner does not dispute that the other branch of the hearsay exception for statements against interest—statements against pecuniary and proprietary interest—is a "firmly rooted" exception, as this Court has used that term. If that is so, however, it is difficult to understand why the result should be different in the case of the "penal interest" branch of the exception. The central requirement of both branches is the same—that the statement must be sufficiently against the declarant's interest that he would not have made it if he did not believe that it was true. That inquiry is exactly the same for one kind of statement against interest as for another. The only significant difference between the two branches, for purposes of determining how "firmly rooted" they are, is that two sharply criticized decisions from 150 and 80 years ago refused to recognize statements against penal interest as falling within the scope of the exception. Since the influence of those decisions has largely abated, it does not make sense to treat one branch of the "statements-against-interest" exception as firmly rooted and the other branch not.

In sum, the exception for declarations against penal interest is a firmly rooted hearsay exception, as this Court has used that term. First, it is widely accepted in contemporary law, having been embraced in the Federal Rules of Evidence and a majority of the States. Second, although

defines too large a class for meaningful Confrontation Clause analysis." 476 U.S. at 544 n.5. Unlike the broad category referred to by the Court, the class of statements at issue here is narrowly defined as statements that "so far tend[ ] to subject the declarant to * * * criminal liability * * * that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Fed. R. Evid. 804(b)(3). The footnote in *Lee* on which petitioner relies cannot be taken as holding that statements satisfying the requirements of that Rule nonetheless must be excluded from admission under the Confrontation Clause.

there was a period of time during the last century in which most courts formally refused to recognize a common law hearsay exception for statements against penal interest, there were many cases even during that period that effectively recognized the penal interest exception by recharacterizing declarations against penal interest as statements against pecuniary interest. And third, ever since Justice Holmes' dissent in *Donnelly* in 1913, the trend in the law has favored recognizing a hearsay exception for statements against penal interest.

III. NEITHER RULE 804(b)(3) NOR THE CONFRONTATION CLAUSE REQUIRES CORROBORATION OF A STATEMENT AGAINST INTEREST

Petitioner contends (Br. 45-46) that before the government could introduce Harris's hearsay declarations, it was required to establish particularized guarantees of trustworthiness under this Court's decision in *Idaho* v. *Wright, supra.* That contention is contradicted by both the text of Rule 804(b)(3) and the principles reflected in this Court's Confrontation Clause decisions.

First, there is no basis for that requirement in the text of Rule 804(b)(3) or the accompanying Advisory Committee Note. In fact, Rule 804(b)(3) specifically provides that a statement against penal interest "offered to *exculpate* the accused" is not admissible unless "corroborating circumstances clearly indicate the trustworthiness of the statement" (emphasis added). There is no corresponding requirement applicable to statements against interest offered to *inculpate* the accused, even though Rule 804(b)(3) clearly contemplates that such statements will be admissible in appropriate circumstances. See Fed. R. Evid. 804 advisory committee note, 28 U.S.C. App. at 790. The disparate treatment of exculpatory and inculpatory statements

against penal interest carries the clear negative implication that inculpatory statements require no separate showing of "corroborating circumstances."

Second, the Confrontation Clause does not require proof of corroboration as a prerequisite to admission. As discussed, this Court in *Ohio* v. *Roberts, supra,* drew a sharp dichotomy for Confrontation Clause purposes between statements admitted pursuant to a "firmly rooted" hearsay exception and those not admitted pursuant to such an exception. Under that framework, "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." 448 U.S. at 66. This Court has adhered to that distinction in subsequent decisions, see, *e.g., White* v. *Illinois, supra; Idaho* v. *Wright, supra,* and petitioner has offered no basis for reconsidering that approach here. Because the hearsay exception contained in Rule 804(b)(3) is "firmly rooted" in our jurisprudence, the Confrontation Clause does not impose any special showing of reliability, through corroborating circumstances.

Finally, even if the Confrontation Clause required an independent showing of reliability to justify admission of statements against penal interest, that showing would be made in every case in which a statement is properly held admissible under Rule 804(b)(3). The very premise of admitting evidence under Rule 804(b)(3) is that no "reasonable person" would make a statement qualifying under the Rule, "unless believing it to be true." Fed. R. Evid. 804(b)(3). Thus, as we have noted above, the test provided by the Rule itself requires that the statement be made under circumstances that ensure its reliability. For that reason, the Confrontation Clause concerns are satisfied, if the Rule is properly applied, with respect to any statement

that is found to be genuinely against the declarant's penal interest. In that regard, the rule authorizing the admission of statements against interest enjoys the same guarantee of reliability as other well-established hearsay exceptions, such as the "business records" exception, the "excited utterance" exception, and the exception for declarations of co-conspirators in furtherance of the conspiracy.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
JO ANN HARRIS
Assistant Attorney General
JOHN F. MANNING
Assistant to the Solicitor General
DAVID S. KRIS
Attorney

MARCH 1994

☆ U.S. GOVERNMENT PRINTING OFFICE: 1994—301-157/86127